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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 877

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 227 F. 2d 825.

JURISDICTION

The final decree of the Court of Appeals was entered on January 5, 1956. By order of Mr. Justice Minton, dated April 3, 1956 (Pet. 23), the time

for filing a petition for a writ of certiorari was extended to April 19, 1956, and the petition was filed on April 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission, in finding that petitioners have long been parties to a price-fixing conspiracy, improperly relied on evidence of meetings and discussions ostensibly incident to formulating an NRA code of fair competition.

2. Whether the Commission's findings of conspiracy and its findings of unlawful price discrimination in the sale of white lead-in-oil are supported by substantial evidence.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any cir-

> cuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * * . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

Section 5 of the National Industrial Recovery Act, 48 Stat. 198, provided:

> While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

Section 2 of the Clayton Act, as amended by the Robinson Patman Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) * * * it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the

benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

Count I of the Commission's amended complaint charged that the petitioners and certain other companies had violated Section 5 of the Federal Trade Commission Act by combining and conspiring to restrain and suppress competition in the price and terms of sale of lead pigments (R. 63-64, 66-74). Count II charged that each petitioner had been violating Section 2(a) of the Clayton Act by discriminating in price between different purchasers of lead pigments, and that the effect of such discriminations may be substantially to lessen competition between petitioners and their competitors, to tend to create a monopoly of interstate commerce in lead pigments, and to injure, destroy and prevent competition between buyers receiving the benefit of petitioners' lower discriminatory prices and other buyers from petitioners (R. 74-78). After extensive administrative proceedings the Commission made detailed findings of fact (R. 3732-97), concluded that petitioners had violated both the foregoing statutes (R. 3797-8), and entered a cease and desist order (R. 3799-3802). Upon review, the court below upheld the Commission's findings of conspiracy and its findings of unlawful price discrimination (except in one particular not here relevant).

The facts as found by the Commission may be summarized as follows:

A code of fair competition for the lead industry, Article VII of which set forth trade practice rules for the lead pigments division of the industry, was approved pursuant to the National Recovery Act on May 24, 1934 (R. 3760). Prior to such approval various producers of lead pigments, including petitioners, had engaged in a series of meetings and discussions, beginning in July 1933, through the medium of the Lead Pigments Division of the Lead Industries Association (R. 3751-52). These meetings and discussions had resulted in understandings and agreements to do the following (R. 3761-62):

(1) To sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less on the basis of flat delivered prices to customers within designated geographical zones, with a specified differential between the designated zones, and to sell on the same basis of flat delivered prices to customers within designated geographical zones dry white lead, red lead and litharge in drums or barrels of quantities less than 20 tons, and red lead and litharge in drums or barrels of 20 tons or more (R. 3762-66).

(2) To sell white lead-in-oil on the basis of consignment contracts for the purpose of controlling resale prices and preventing competition between the producers and their customers (R. 3767).

(3) To maintain certain specified price differentials, to allow uniform discounts and terms of sale, and to eliminate guarantees against price declines in certain sales (*ibid.*).

To the present time, petitioners have adhered to the pricing practices and to the terms and conditions of sale agreed upon in 1933 and 1934 (R. 3772, 3778), with only trifling exceptions (R. 3779, 3781, 3785-86), although prior to the 1933-1934 agreements pricing methods and terms and conditions of sale in the lead pigment industry were not uniform (R. 3749-50).

Neither the approved NRA code nor any preliminary draft made reference to use of delivered zone prices or consignment contracts in the sale of white lead-in-oil (R. 3761). Certain other provisions of the agreements and understandings entered into in 1933 and 1934 were incorporated in the approved code, but these provisions never became effective because petitioners and the other manufacturers of lead pigments obtained from the National Recovery Administration an express exemption from these requirements (R. 3761).

With respect to the charge of price discrimination, the Commission found that petitioners, through price differences resulting from their zone delivered prices and quantity and quality price differentials, had discriminated in price between different purchasers in the sale of oxides (red lead and litharge), dry white lead, and "keg products" including white lead-in-oil (R. 3787-96). For example, petitioners sold white lead-in-oil and all other "keg products" pursuant to a zone delivered price system which divided the country into twelve geographical zones, of which one was a par or base price zone, two had a premium of

12½¢ per cwt., three a premium of 25¢ per cwt., one a 37½¢ per cwt. premium, two a 50¢ per cwt. premium, two a 75¢ per cwt. premium, and one a premium of $1.00 per cwt. (R. 3762; Map, R. 3763).

Petitioners' differing zone prices were justified only where the additional freight or other transportation costs equaled or exceeded the zone premium; where this was not the case, the differing prices to competing purchasers were discriminatory (R. 3795). While evidence was offered to show that the zone differentials for white lead reflect no more than average differences in freight costs as between different zones, the fact that there is a specified variation in the *average* cost in shipping to customers in an area of a dozen or more states "does not justify the discriminations which result in particular transactions with individual customers located in border territories" (R. 3794). The use of the inter-zone differentials has had the effect of lessening competition between customers of petitioners located in different zones who are in competition in the sale of paints, storage batteries, and other products which they manufacture, and of creating a trade advantage in favor of customers who have received the lower prices in the par zones and elsewhere (R. 3795).

ARGUMENT

1. Section 5 of Title I of the National Industrial Recovery Act provided that, while Title I was in effect and for 60 days thereafter, any code "approved" and "in effect" under that title, and any

action taken during this period in compliance with such code, should be exempt from the federal anti-trust laws (*supra*, p. 3). Plainly, the conduct of petitioners which the Commission found to be illegal, a conspiracy continuing some 18 years after Title I had expired,[1] is not within this exemption. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227, this Court, rejecting the contention that defendants' price-fixing conspiracy was immunized by Section 5, said:

> But even had [code] approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen, the buying program continued unabated during the balance of 1935 and far into 1936. As we said in *United States* v. *Borden Co.*, 308 U.S. 188, 202, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondents' activities subsequent thereto.

Petitioners do not contend that they are within any immunity given by expired Section 5, but con-

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[1] Title I expired on June 16, 1935. Section 2(c) of the National Industrial Recovery Act of June 16, 1933, provided that Title I "shall cease to exist at the expiration of two years after the date of enactment of this Act" (48 Stat. 196).

tend that it was unconscionable for the Commission to rely on evidence of what they did during the period in which they were undertaking to formulate an NRA code (Pet. 16-17). But there is in fact no basis for this complaint. Zone delivered prices and the consignment method of selling white lead-in-oil, which were major elements of petitioners' conspiracy, were never even proposed as code provisions, and, while certain relatively minor elements of the conspiracy were incorporated in the approved code, these code provisions never went into effect (*supra*, p. 6).

The courts have upheld orders issued under the Trade Commission Act in which the Commission, in finding a price-fixing conspiracy, relied on evidence of activities or conduct incident to the formulation or carrying out of an NRA code.[2] The one contrary decision which petitioners cite, *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533, 549 (C.A. 7), was reversed in this respect. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 704-705.

Moreover, petitioners are mistaken when they assert (Pet. 16) that the Commission's findings of conspiracy "were based solely on evidence of what occurred during NRA days", and that the Commis-

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[2] *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 328-329 (C.A. 7), certiorari denied, 323 U.S. 730; *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899, 906 (C.A. 7), certiorari denied, 329 U.S. 795; *Allied Paper Mills* v. *Federal Trade Commission*, 168 F. 2d 600, 603, 608 (C.A. 7).

sion's counsel so conceded.[3] The Commission's findings of conspiracy were additionally based upon evidence showing the radical revision which occurred in the industry's pricing and marketing practices following the 1933 and 1934 meetings and upon evidence that petitioners subsequently adhered to and continued these practices (see R. 3771-74, 3777-84).

2. Petitioners question the sufficiency of the evidence to sustain the Commission's finding of conspiracy and its finding of unlawful price discrimination in the sale of white lead-in-oil (Pet. 18-22). This request for further review of the evidence and the inferences to be drawn from it is plainly unworthy of certiorari. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178; see also *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U.S. 52, 64; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73. And the settled principles opposing such review by this Court are not avoided by the suggestion (Pet. 18) that the Court of Appeals neglected its duty to determine whether the Commission's findings had adequate evidentiary support. Actually, the court below considered this problem at length and in detail (see 227 F. 2d at 829-834), and properly concluded that although "there is no direct evidence as to formal agreement on the part of peti-

[3] In support of the statement that counsel so conceded, petitioners cite R. 2269 and the Commission's court of appeals brief (pp. 57-58), but neither citation shows any such concession.

tioners to adopt the zone system and uniform pricing practices" (*id.* at 832), the "inference of agreement, if not necessarily impelled by [this] evidence, is certainly a reasonable one which the Commission as the trier of fact was entitled to draw therefrom" (*id.* at 833).

The evidentiary issue which petitioners raise with respect to price discrimination is limited to white lead-in-oil, although the Commission likewise found unlawful price discrimination with respect to the other lead pigments which they market (R. 3787-95, 3797). Furthermore, inadequacy of the evidence is asserted only as to the effect on competition of the price discriminations in the sale of white lead-in-oil.[4] The insubstantiality of this contention is clear. Section 2(a) of the Clayton Act prohibits price discrimination between different purchasers where the effect "may be" substantially to lessen competition or to injure competition among such purchasers. In *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 738, this Court held that the word "may" was used in order to reach those discriminations which would "probably have the defined effect" on competition, and that Section 2(a) "does not require a finding that the discriminations in price have in fact had an adverse effect on competition", the statute being designed to reach such discriminations in their in-

[4] Petitioners also assert absence of a finding that the purchasers of this product were in competition with each other (Pet. 21), but such a finding was made (R. 3793-4, 3795, 3797).

cipiency, "before the harm to competition is effected." The Court also held that findings that glucose is a principal ingredient of low priced candy, and that slight differences in the sales prices of such candy are enough to divert business from one manufacturer to another, provided adequate basis for the Commission's inference that there is a reasonable probability that the effect of price discriminations in the sale of glucose may be substantially to lessen competition among purchasers of glucose. *Id.* at 739.

In the present case there were findings parallel to those held to be sufficient in the *Corn Products* case (R. 3793-96), and there was evidence to support these findings. As the court below stated, the evidence tended to show that there is keen competition between dealers in paint products, including white lead-in-oil, and that "there is more than a reasonable possibility" that competition would cross the arbitrary zoning lines established by petitioners, which lines bisect ten states and in some instances place a single city or metropolitan area in a preferred zone status over the remainder of the state in which it is located (227 F. 2d at 835). The court noted that St. Louis is in a par zone as contrasted with the 12½¢ higher zone in the rest of the state of Missouri; that San Francisco, Oakland, and Berkley are par territories while the remainder of California is in a 25¢ zone; and that the area immediately encompassing Omaha and Lincoln, Nebraska, and Atchison, Leavenworth, and Kansas

City, Kansas, are in a 12½¢ zone, while the remaining area of their respective states is in the 25¢ zone (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
STANLEY M. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

EARL W. KINTNER,
General Counsel.
ROBERT B. DAWKINS,
Assistant General Counsel.
Federal Trade Commission.

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